No. 83-929

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IN THE

# Supreme Court of the United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.
*Defendants-Appellants,*

DOUGLAS T. SMITH, et al.
*Intervenors-Appellants,*

v.

ISHMAEL JAFFREE, et al.
*Appellee.*

GEORGE C. WALLACE, Governor, et al.
*Defendants-Appellants,*

DOUGLAS T. SMITH, et al.
*Intervenors-Appellants,*

v.

ISHMAEL JAFFREE, et al.
*Appellee.*

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## JURISDICTIONAL STATEMENT

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## Questions Presented

1. Does a moment of silence for individual silent "prayer or meditation" at the beginning of each school day in a public school classroom violate the Establishment Clause of the First Amendment as interpreted by its language, framers' intent, and history?

2. Did the terms of the Fourteenth Amendment and the intent of the Thirty-ninth Congress and the ratifying state legislatures that adopted it render the Establishment Clause applicable to the states, amending the First Amendment and thereby giving the federal courts jurisdiction over state religious establishments?

3. Does the Tenth Amendment prohibit the federal courts from asserting jurisdiction over state religious establishments if the Fourteenth Amendment and its framers' intent did not apply the Establishment Clause to the states?

4. Even if the Establishment Clause is applicable to the states, does the unique history of the Establishment Clause, including the Northwest Ordinance of the First Congress (providing for the teaching of religion and morality in federally-funded schools), guarantee the right of public school students and teachers to pray, either individually or by classroom activity, and the state of Alabama the right to protect this freedom by statute, without violation of the Establishment Clause?

5. Is the United States Supreme Court, in interpreting the Establishment Clause of the First Amendment of the United States Constitution, bound by its precedents that conflict with the terms, intent, and historical context of the Constitution?

## List of All Parties

Undersigned counsel of record for Intervenors-Appellants certify that the following listed parties have an interest in the outcome of this case.

Ishmael Jaffree, Jamel Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree, named plaintiffs herein.

The Board of School Commissioners of Mobile County, Alabama; the Mobile County School Board Commissioners, Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth Drago and Dr. Robert Gilliard; Dr. Abe Hammons, Superintendent of the Board of Education of Mobile County; Mobile County School teachers, Julia Green, Charlene Boyd and Pixie Alexander; Mobile County School principals, Annie Bell Phillips, Betty Lee and Emma Reed.

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No. _____

IN THE

# Supreme Court of the United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.

*Defendants-Appellants,*

DOUGLAS T. SMITH, et al.

*Intervenors-Appellants,*

v.

ISHMAEL JAFFREE, et al.

*Appellee.*

GEORGE C. WALLACE, Governor, et al.

*Defendants-Appellants,*

DOUGLAS T. SMITH, et al.

*Intervenors-Appellants,*

v.

ISHMAEL JAFFREE, et al.

*Appellee.*

## Opinions Below

The Preliminary Injunction of the United States District Court, Southern District of Alabama, Southern Division, was issued and reported on August 9, 1982, in *Jaffree v. James*, 544 F. Supp. 727

(S.D. Ala. 1982) (reprinted in Appendix to Jurisdictional Statement of George C. Wallace at 64d A. All references to the Appendix of Wallace will be followed by A). This Preliminary Injunction was later vacated by the Order of the court issued and reported on January 14, 1983, in *Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983) (reprinted in Appendix at 56d A). The Memorandum Opinion in the companion case was issued and reported on the same day in *Jaffree v. Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983) (reprinted in Appendix to Writ of Certiorari of Board of School Commissioners of Mobile County at 1d B. All references to the Appendix of the Board will be followed by B). The United States Court of Appeals for the Eleventh Circuit denied the appellant's request for emergency relief from the district court Opinion, but Justice Powell, as Circuit Justice, stayed the judgment pending appeal on February 11, 1983, in *Jaffree v. Board of School Commissioners of Mobile County*, ___ U.S. ___, 103 S. Ct. 842 (Feb. 11, 1983) (Powell, J. as circuit justice) (reprinted in Appendix at 3e B). The two cases were consolidated upon appeal, and Governor George C. Wallace was substituted for Governor Fob James. The Opinion of the United States Court of Appeals for the Eleventh Circuit, affirming in part and reversing in part, and remanding with directions, was issued on May 12, 1983, in *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983) (reprinted in Appendix at 1a B). The Per Curiam Decision of the court of appeals denying the petition for rehearing and suggestion for rehearing en banc, with an accompanying dissent written by Judge Roney, was issued on August 15, 1983, in *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. 1983) (reprinted in Appendix at 1b B). The district court then issued an Order enforcing the Order of the court of appeals and enjoining the statutes and activities there held to be unconstitutional, on October 14, 1983 (reprinted in Appendix at 56d B).

## Jurisdiction

Jurisdiction of this Court, to review the final judgment of the court of appeals that held a state statute or an activity treated as a state statute unconstitutional, is conferred by 28 U.S.C. § 1254(2).

The subject of this case is (1) the constitutionality of two separate state statutes passed by the Alabama legislature which (a) permit a

teacher to begin the day with a period of silence for "meditation or voluntary prayer" (ALA. CODE § 16-1-20.1) and which (b) permit a teacher to lead willing students in verbal prayer to God at the beginning of any class or homeroom (ALA. CODE § 16-1-20.2). The final subject of this case is (2) the constitutionality of individual teachers' leading their willing students in verbal prayer without any policy having been established by the school board. The court of appeals held that the Board of School Commissioners ratified the teachers' voluntary prayer activities since it had notice of them. *Jaffree v. Wallace*, 705 F.2d at 1534-35.

The district court, after hearing extensive testimony and receiving considerable evidence as to the history and intent of the drafters of the First and Fourteenth Amendments, held that the federal courts did not have jurisdiction over state religious activities or establishments for the reason that the terms, intent, and history of the Fourteenth Amendment show that it did not apply the Establishment Clause to the states. The court of appeals, relying on precedents of this Supreme Court, reversed, holding that both the statutes and the voluntary teacher activities (which the court of appeals held the Board had ratified) were unconstitutional.[1] A Notice of Appeal by the Appellant-Intervenors (the Defendant-Intervenors at the trial court) was filed on November 2, 1983, (reprinted in Appendix 3a). Appellant-Intevenors were granted an extension of time, in which to docket their appeal until December 3, 1983, by Justice Powell on November 7, 1983.

**Constitutional and Statutory Provisions**

The Appendix contains in full the following provisions: Article VI, clause 2 and First and the Tenth Amendments of the United States Constitution (at 1a); the relevant portions of the Fourteenth Amendment of the United States Constitution (at 1a) and of the Northwest Ordinance (at 2a); and ALA. CODE §§ 16-1-20.1 and 16-1-20.2 (at 2a).

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[1] "If the Supreme Court errs, no other court may correct it." *Jaffree v. Wallace*, 705 F.2d at 1533, relying on *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, ___ U.S. ___, 103 S. Ct. 1343, 1344 (1983).

## Statement of the Case

On May 28, 1982, Appellee, Ishmael Jaffree (hereinafter "Jaffree"), on behalf of his three minor children enrolled in the Mobile, Alabama public school system, brought this action against the Board of School Commissioners of Mobile County, Alabama, the principals of the three schools his children attended, and his children's teachers. He alleged that the teachers (two black and one white), at their own initiative and in the absence of a school board policy, had led willing students in a voluntary saying of a simple grace before meals, such as "God is great, God is good, and we thank Him for our food. By His hands we all are fed, give us Lord our daily bread . . . " and "For health and strength and daily food we praise Thy name, O Lord."[2] (R. 1-9)[3] Jaffree requested a permanent injunction against (1) *all activities* designed to encourage a belief in religion, and (2) all teaching from *all instructional materials* which further a belief in religion. (R. 8,9). Jaffree then amended his complaint to ask that two separate Alabama statutes be declared unconstitutional: ALA. CODE § 16-1-20.1, providing a one-minute period of silence at the beginning of the school day "for meditation or voluntary prayer"; and ALA. CODE § 16-1-20.2 (Act No. 32-753, enacted July 8, 1982, some 41 days after Jaffree's original complaint), authorizing teachers to lead willing students in prayer and providing a suggested prayer.[4] Governor Fob James was added as a named defendant. (R. 92-100).

The trial judge, Judge W. Brevard Hand, severed Jaffree's various requests for relief into two separate causes of action: 82-0554-H, which concerned the requests for relief against the teachers and local school board, and 82-0792-H, which dealt with the constitutionality of the Alabama statutes. (R. 282). On August 9, 1982, the district court issued a preliminary injunction (R. 703-14) against the en-

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[2] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1107. The first prayer, correctly stated here, was misquoted by the court of appeals.

[3] "(R. ___)" designates Record on Appeal; "(T. ___)" designates Trial Transcript.

[4] The language quoted by the court of appeals is from the bill as introduced into the legislature. *See* Constitutional and Statutory Provisions, *supra*, for the language as enacted.

forcement of the two statutes (82-0792-H). The court stated, however, that "[t]his Court will not by judicial fiat delineate what a teacher or student may do in regard to his personal religious benefits for these are matters of personal conscience."[5] (R. 721).

On August 2, 1982, seventeen people (R. 252-57) were allowed to intervene as party defendants. (R. 704). Following a motion filed October 22, 1982, 607 additional teachers, parents and students were allowed to join the original seventeen and have since continued as Intervenors. (R. 424). The Defendant-Intervenors, through their counsel, actively participated in the trial on the merits, November 15-18, 1982, by the presentation of five expert witnesses and three teachers, one parent, and one student as witnesses, as well as by cross-examination, oral arguments, and briefs.

On September 15, 1982, Governor Fob James attempted to file in this Court, under Supreme Court Rule 26, a Petition for a Writ of Mandamus[6] to instruct the Chief Judge of the U.S. District Court for the Southern District of Alabama, Southern Division, to dismiss the case before him for lack of federal jurisdiction over the religious activities within the states. The Clerk of the Court refused to accept the petition so that this Court never had the opportunity to determine whether to use its discretionary powers under 28 U.S.C. § 1651.

On January 14, 1983, the district court entered orders in each case dismissing the claims for want of jurisdiction, stating:

> This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate. . . .
>
> Because the establishment clause of the first amendment

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[5] *Jaffree v. James*, 544 F. Supp. at 733.

[6] *See* Brief of the Governor of Alabama, captioned *In Re the State of Alabama by Its Governor Fob James, Petition for a Writ of Mandamus*, Defendant-Intervenors' Ex. 15.

> to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.[7]

The plaintiff appealed to the Eleventh Circuit Court of Appeals (R. 522), which denied his motion for emergency relief seeking a stay of Judge Hand's order. On February 2, 1983, Justice Lewis F. Powell temporarily granted Jaffree's application seeking a stay of the judgments of the district court. On February 11, 1983, Justice Powell continued the stay, stating: "Unless and until this Court reconsiders the foregoing decisions [*Engel v. Vitale*, 370 U.S. 421 (1962) and *Murray v. Curlett*, decided with *Abington School District v. Schempp*, 374 U.S. 203 (1963)], they appear to control this case."[8]

On May 12, 1983, the three-judge panel[9] of the court of appeals reversed the district court's dismissal of the two cases holding that the one-minute period of silence for meditation or prayer (§ 16-1-20.1), as well as the teacher-initiated prayers for willing students, and the statute authorizing prayer (§ 16-1-20.2) were violations of the Establishment Clause, holding that the school board had ratified the teachers' activities.[10] The court further held that the Establishment Clause prohibited "any government involvement with religion" and that "the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation," implying that teachers may not discuss any religious matters in public school.[11] On August 15, 1983, the court denied defendants-appellees' petition for rehearing and suggestion for rehearing en banc.

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[7] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1128 and *Jaffree v. James*, 554 F. Supp. at 1130.

[8] *Jaffree v. Bd. of School Comm'rs*, ___ *U.S.* ___ 103 S. Ct. at 843.

[9] Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, sitting by designation, died the day the decision was issued.

[10] *Jaffree v. Wallace*, 705 F.2d at 1533-36. Governor George C. Wallace was substituted for former Governor Fob James prior to the court of appeals ruling.

[11] *Id.* 705 F.2d at 1531 and 1536.

A dissent by four judges on the court of appeals, written by Judge Roney, argued that the statute providing for a moment of silence for meditation or voluntary prayer, is neutral and "facially and operationally constitutional."[12] ALA. CODE § 16-1-20.1.

The consolidated cases are now before this Court pursuant to appeals by the State of Alabama, the Board of School Commissioners of Mobile County, and the Defendant-Intervenors, the 624 affected teachers, parents, and students on whose behalf this brief is filed.

## Reasons Why Questions Presented Are Substantial

### Introduction

The federal courts have attempted to usurp the authority of God by asserting jurisdiction over prayer. Conversations with or petitions to our Lord are under His authority.

It is absurd to claim that all religions are equally valid. No, the Lord God is One, as our Founding Fathers recognized in the Declaration of Independence and other documents on which the colonies were established. It is idolatrous to assert that He is one among many. He is the only One.

But since the courts have claimed jurisdiction over prayer and audaciously rejected the Lord's sovereignty, the only thing left to appeal to which this Court should still recognize is the United States Constitution, whose language, intent, and history contradict this Court's position.

Further, the holding of the Eleventh Circuit Court of Appeals in this case has created a crisis in public education because of the uncertainties it causes as to what religious speech and activities are now permissible and because of the chilling effect the court's broad prohibition has on teacher and student free speech and free exercise of religion. The court below ruled that "a period of silence . . . for meditation or voluntary prayer" is unconstitutional,[13] an issue on

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[12] *Jaffree v. Wallace*, 713 F.2d at 616.

[13] *Jaffree v. Wallace*, 705 F.2d at 1528.

which the federal courts are split.[14] Additionally, it ruled that the Establishment Clause prohibited "any government involvement with religion"—prohibiting teacher-led voluntary prayer and meditation.[15] The first holding is incorrect under current law, in our view. The second holding is incorrect under the language, intent, and history of the Fourteenth Amendment and of the First Amendment.

The district court below held that current law conflicts directly with the Constitution so that the latter must be followed. The Opinion relied heavily on the recent scholarship of Professor Raoul Berger of Harvard Law School in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) on the language, intent, and history of the Fourteenth Amendment and of Professor Robert L. Cord of Northeastern University in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982) on the language, intent, and history of the Establishment Clause of the First Amendment, as well as the scholarly testimony of James McClellan, former professor at Emory University and former Chief Counsel to the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. In terms of the correctness of current law, the district court stated:

> Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praise in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegiance. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the People perceive that justice is myopic, obtuse, and janus-like.[16]

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[14] *See, e.g., Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) and *Reed v. Van Hoven*, 237 F. Supp. 48 (D. Mich. 1965). *See contra Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983) and *May v. Copperman*, ___ F. Supp. ___ (D.N.J. 1983).

[15] *Jaffree v. Wallace*, 705 F.2d at 1531.

[16] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1129. One of the reasons advanced by the Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) for

The appellate court's interpretation of the Establishment Clause would have been repugnant to a member of the First Congress that drafted it in 1789. When several representatives feared the clause might be taken as showing hostility to all religions, they were assured by its author, James Madison, that it was only intended to prevent the establishment of a national religion or sect.[17]

The appellate court failed to consider either these debates or the early acts of Congress which encouraged the teaching of religion and morality in the public and private schools of the Northwest Territory and the propagation of the gospel in Indian schools.[18] The men who adopted the Establishment Clause believed that "[r]eligion, morality, and knowledge, [were] necessary to good government and the happiness of mankind, [and that therefore] schools and the means of education [which taught religion, morality, and knowledge should] forever be encouraged."[19]

The 624 teachers, parents, and students who are the Appellant-Intervenors ask this honorable Court to examine the historical evidence presented for the first time by the adversarial system in the trial court below and to put an end to the present crisis in free speech and free exercise of religion by returning to the original intent of the Establishment Clause.

## I.

## A Moment For Individual Prayer or Meditation at the Beginning of Each School Day in Public School Classrooms Does Not Violate the Establishment Clause of the First Amendment.

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overturning *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law [which] developed a new well of uncertainties."

[17] *See* speeches of Peter Sylvester, Benjamin Huntington and James Madison, 1 ANNALS OF CONGRESS 729-31 (August 15, 1789).

[18] *See* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION, 42-43, 62-79, 261-70 (1982), introduced into evidence as Defendant-Intervenor Ex. 14, excerpted in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix II.)

[19] Northwest Ordinance, art. III, 1 Stat. 52 (Aug. 7, 1789).

A crisis in public education now exists as a result of the Establishment Clause decisions of the federal judiciary during the last thirty-six years. Educators and students alike are bewildered by incongruous decisions such as *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding a statute requiring a period of silence for prayer or meditation) and *Reed v. Van Hoven*, 237 F. Supp. 48 (D. Mich. 1965) (upholding the rights of students to meet before or after school to pray and read the Scriptures) as contrasted with the decision of the court of appeals below which overturned a statute authorizing silent prayer or meditation and prohibited voluntary prayer.[20]

Judge Roney, dissenting with three other judges from the denial of the petition for rehearing in this case by the Eleventh Circuit, noted that the issue of the constitutionality of a moment of silence for meditation or voluntary prayer has not been definitively resolved by the federal courts. *Jaffree v. Wallace*, 713 F.2d at 614. Citing a number of the leading constitutional scholars on the issue, he relies on First Circuit Chief Judge Coffin, writing the three-judge panel decision in *Gaines v. Anderson*, 421 F. Supp. at 343. Judge Coffin notes how such a statute "accommodate[s] students who desire to use the minute of silence for prayer or religious meditation, and also other students who prefer to reflect upon secular matters.[21]

This Court has upheld the right of state legislatures and Congress

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[20] *Jaffree v. Wallace*, 705 F.2d at 1537. Although the Supreme Court of Massachusetts struck down the voluntary prayer and meditation statute referred to above in *Kent v. Comm'r of Educ.*, 402 N.E.2d 1340 (1980), the federal district court decision in *Gaines v. Anderson* has not been overruled. *See also Opinion of the Justices*, 228 A.2d 161 (N.H. 1967), upholding a bill requiring a period of silence for meditation or the placement in each classroom of a plaque bearing the words "In God We Trust".

Federal court decisions which prohibit in-class prayer include *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd* 445 U.S. 913 (1982); *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D.N.M. 1983); *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981); and *May v. Cooperman*, ___ F. Supp. ___ (D.N.J. 1983).

[21] Justice Brennan, concurring in *Abington School Dist. v. Schempp*, 374 U.S. at 281 & n. 57 (1963), suggested that "the observance of a moment of reverent silence at the opening of class" would likely meet the test of constitutionality.

to use funds to pay a chaplain to pray before legislative sessions. *Marsh v. Chambers*, ___ U.S. ___, 103 S. Ct. 3330 (1983). Elementary school children and high school students may hear these officially-sponsored prayers offered when visiting their state or federal capitals.

This Court has protected the right of state university students to assemble on public property for prayer and Bible study. *Widmar v. Vincent*, 454 U.S. 263 (1981).

And this Court has specifically ruled that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Community School District*, 393 U.S. 503, 506 (1969).

Appellant-Intervenors petition this Court to reexamine the intent of the drafters of the First and Fourteenth Amendments to return this nation to the true meaning of the Establishment Clause.

## II.

## The Language, Intent, and History of the Fourteenth Amendment Prove that Congress and the Ratifying State Legislatures Never Intended to Make the Establishment Clause Applicable to the States. Thus the Court of Appeals Violated the Tenth Amendment in Striking Down the Challenged Alabama Statutes and Practices.

### *A. The Purpose of the Fourteenth Amendment Was To Limit the Power of the States only when They Failed To Afford Due Process of Law or Equal Protection of Law to Their Citizens.*

When the court of appeals below struck down ALA. CODE §§ 16-1-20.1 and 16-1-20.2, and restrained public school teachers from individually leading willing students in prayer, the court assumed jurisdiction over religious practices within states which was never delegated to the federal government. The court of appeals relied on the Fourteenth Amendment as rendering the Establishment Clause applicable to the states.

However, the district court below held, after extensive review of the evidence of intent and history, that the due process clause of the Fourteenth Amendment does not and was never intended to apply

the Establishment Clause to the states. *Jaffree v. Board of School Commissioners*, 554 F. Supp. at 1124. The district court below relied *inter alia* on Professor Raoul Berger of Harvard Law School, who exhaustively and conclusively demonstrates this in GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT.[22] The court also relied on a scholarly article by Professor Charles Fairman, then of Stanford Law School, entitled: *Does the Fourteenth Amendment Incorporate the Bill of Rights?*[23]

After 431 pages of discussion with many hundreds of footnotes, Professor Berger concludes that:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody . . .[24]

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[22]R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1120-22 (excerpted in Brief of Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix IV.)

[23]Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949), cited in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1119 (included by Appellee-Intervenors in their Brief to the Eleventh Circuit Court of Appeals as Appendix V). *See also* H. MEYER, THE HISTORY AND MAKING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT (1977), (excerpted in Brief of Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix VI and introduced in evidence as Defendant-Intervenors Ex. 15).

An impressive number of scholars have also written in support of the Fairman view and in opposition to Justice Black's extension of the Establishment Clause to the states. *E.g.* M. HOWE, THE GARDEN AND THE WILDERNESS 22-33 (1965); W. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS (1964); Katz, *The Case for Religious Liberty*, in J. COGLEY, RELIGION IN AMERICA 101 (1958); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L. Q. 371; and J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 10 (1949). *But see*, Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

[24]R. BERGER, *supra* note 22, at 407.

### *B. The Congressional Debates over the Fourteenth Amendment Do Not Contain a Single Reference to the Establishment Clause at All. Instead, the Sponsors of the Amendment Claimed that It Took No Powers Away From the States.*

There is no reference to the Establishment Clause in the debates on the Fourteenth Amendment. Professor James McClellan, constitutional expert for appellants, testified that the issue of application of the Fourteenth Amendment to the states "was not even debated when the Fourteenth Amendment was prepared and drafted [by] Congress." (T. 544-45). Congress never viewed federal control of state establishments as one of its objectives or consequences.

Instead, both "radical" and "moderate" Republicans who controlled both the House and the Senate argued that it took no powers away from the states except to require them to apply their own due process requirements equally to all their citizens — regardless of race — and to protect the Civil Rights Act of 1866 from repeal by a future Democratic Congress.[25] Further, the House defeated the original version of the Fourteenth Amendment introduced by Rep. John Bingham of Ohio, which would have permitted Congress to legislate generally in this area.[26]

### *C. The Congressional Debates over the Fourteenth Amendment Do Not Contain Any Reference to the Application of the Bill of Rights or the Establishment Clause to the States.*

As noted by the court below, the *only* reference in the debates to "the first eight amendments of the Constitution" is by Sen. Jacob

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[25] *See* Fairman, *supra* note 23, at 43-68.

[26] The text refers specifically to the privileges and immunities clause of Article 4, section 2 and the 5th Amendment to the Constitution:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States (Art. 4, sec. 2); and to all persons in the several States equal protection in the rights of life, liberty, and property (5th amendment).

JOURNAL OF THE JOINT COMMITTEE ON RECONSTRUCTION 17 (1915); CONG. GLOBE, 39th Cong., 1st Sess. 1033, 1034, 1095 (1866).

Howard, a Republican from Michigan, acting Senate Chairman of the Joint Committee on Reconstruction. *Jaffree v. Board of School Commissioners,* 554 F. Supp. at 1121-22. He believed that the "personal rights" of these eight amendments were included in the "privileges and immunities" guaranteed by the Constitution and Bill of Rights to citizens of the United States.

However, Sen. Howard included in his list of these "personal rights" only the personal judicial rights of trial by "impartial jury", being informed of accusations against oneself, of bail and no search and arrest without a warrant, and of no cruel and unusual punishments; and the personal non-judicial freedoms of speech, press, assembly, bearing arms, and exemption from quartering soldiers in one's home without consent.[27] He did not refer to the Establishment Clause as a "personal right" and did not believe it was to be included in the Privileges and Immunities Clause or in the Due Process Clause. He never stated in the debates that the amendment would interfere with the powers of the state vis-a-vis the federal government, as the power of a state to raise a militia or the power of a state to establish a religion.

Also, as noted by the district court below, both Rep. Bingham and Sen. Howard were unclear as to what would be accomplished by passage of the Fourteenth Amendment. *Id.* at 1120-22.[28] Justice Black relied on, as his sole evidence of the application of the Establishment Clause to the states, a statement by Rep. Bingham in 1871, five years after adoption of the Fourteenth Amendment during

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[27]CONG. GLOBE, *supra* note 26, at 2765.

[28]After defeat of the first draft of the Fourteenth Amendment, but prior to the second draft being completed, in debating the Civil Rights Bill, Rep. Bingham did say that only the state courts, and not federal courts, would have jurisdiction to enforce the Fourteenth Amendment:

> [T]he enforcement of the bill of rights, touching the life, liberty and property of every citizen of the Republic within every organized State of the Union, is of the *reserved powers of the States, to be enforced by State tribunals and by State officials* acting under the solemn obligations of an oath imposed upon them by the Constitution of the United States.

*Id.* at 1291, col. 1 (emphasis added).

debates over the Ku Klux Klan Act. Bingham then argued (as he never did in 1866) that the first eight amendments did so apply. He was vigorously opposed by Rep. Storm of Pennsylvania:

> Sir, if the views now announced by gentlemen on the other side of the House had then been promulgated, that *amendment would never have been ratified.* If the *monstrous doctrine* [especially giving the federal courts jurisdiction in cases applying the Bill of Rights to the states] now set up as resulting from the provisions of that Fourteenth Amendment had then been *hinted at,* that amendment would have received an emphatic rejection at the hands of the people.[29]

However, this was not even Rep. Bingham's view (much less that of Congress) in 1866, when the Fourteenth Amendment was adopted. Instead, Rep. Bingham said near the conclusion of the Fourteenth Amendment debates: "Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it."[30]

Justice Black, in relying on a *post factum* remark by Rep. Bingham, did not refer to this important facet of Bingham's views, which reflects his 1866 viewpoint.

Professor Bernard Schwartz, in his STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, agrees that Bingham's statement in 1871 is far from conclusive. Schwartz notes that his speech was not adopted by Congress, but was a proposal to it for future actions to be taken.[31]

### *D. Congress Voted to Admit Nebraska into the Union, Forty-One Days After the Fourteenth Amendment was Proposed*

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[29]CONG. GLOBE, 42nd Cong., 1st Sess., app. 84 (1871) (emphasis added). *See also* speech of Rep. J.A. Garfield of Ohio (who was later President of the United States), *id.* at app. 150.

[30]CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

[31]B. SCHWARTZ, I STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 294, 306-07 (1970).

***to the States, Despite a Provision in Its Constitution Inconsistent with the Bill of Rights.***

Congress voted to admit Nebraska into the Union on July 27, 1866, which was forty-one days after Congress adopted the Fourteenth Amendment on June 16, 1866. The Nebraska Constitution of 1866, framed in preparation for statehood, explicitly provided that the legislature could authorize "trial by a jury of less than twelve men in inferior courts." NEB. CONST. art. II, § 5 (1866). When Nebraska's admission to the Union was debated at great length in Congress, not a single Representative or Senator took issue with the nonconformity of Nebraska's Constitution to the Seventh Amendment. The outcry in Congress instead was over the exclusion of blacks from suffrage, because the new Nebraska Constitution limited suffrage to whites (the Fifteenth Amendment not yet having been adopted). *Id.* at art. II, § 2.[32] This, the Thirty-ninth Congress did not believe that the first eight amendments applied to the states.

***E. The Debates in the State Legislatures Ratifying the Fourteenth Amendment Do Not Contain a Single Reference to the Establishment Clause or the First Eight Amendments Being Made Applicable to the States.***

During the ratification process of the Fourteenth Amendment, the numerous accounts of legislative debates as well as newspaper accounts of speeches by elected officials (many of whom were congressmen returning from the debates on the Fourteenth Amendment) do not contain any reference to the Establishment Clause or the first eight amendments being made applicable to the states.[33] Even Harry Flack, on whose book Justice Black relied in his dissent in *Adamson v. California*, 332 U.S. 46, 109 (1947), concluded after canvassing the political speeches of candidates in the 1866 election:

> [T]he general opinion held in the North . . . was that the

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[32]However, when a move was made to admit Nebraska on condition that its legislature renounce the discriminatory provision as to suffrage, both Sen. Howard and Rep. Bingham urged admission without condition. CONG. GLOBE, 39th Cong., 2d Sess. 184, 219, 359, 847, 1096, (1866).

[33]*See* Fairman, *supra* note 23, at 68-132. *But see* Crosskey, *supra* note 23, at 110-11.

> Amendment embodied the Civil Rights Act . . . There does *not* seem to have been *any statement at all as to whether the first eight amendments were to be made applicable to the States or not,* whether the privileges guaranteed by those amendments were to be considered as privileges secured by the amendment.[34]

Had state representatives seen that the Establishment or Free Exercise Clauses would now be applicable against their states, there certainly would have been a heated discussion of whether that application should occur, and of how state constitutions or laws would need to be changed.

In New Hampshire, for example, although the Toleration Act of 1819 granted complete freedom to all Christian sects, the state constitution still provided:

> [T]he *people of this state* have a right to empower, and *do hereby fully empower, the legislature to authorize* from time to time the several *towns,* parishes, bodies corporate, or religious societies within this state *to make adequate provisions, at their own expense, for the support* and maintenance *of public Protestant teachers of piety, religion and morality.*[35]

In Maryland the Constitution of 1868 declared a witness or juror incompetent if he did not believe "in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefore in this world or the world to come." Officeholders were required to declare their "belief in the existence of God."[36]

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[34]H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908) (emphasis added), cited in *Jaffree v. Bd. of School Comm'rs,* 554 F. Supp. at 1122.

[35]N.H. CONST. art. VI (1784) (emphasis added). Members of the House and Senate as well as the Governor were required by the New Hampshire Constitution arts. XIV, XXIX, and XLII to be "of the Protestant religion."

[36]MD. CONST. arts. 36 & 37 (1868); *see* McClellan, *The Making and the Unmaking of the Establishment Clause,* A BLUEPRINT FOR JUDICIAL REFORM 308-11 (1981) (Defendant-Intervenors Ex. 12, included in its entirety in Brief of Appellee-Intervenors to the Eleventh Circuit Court of Appeals as Appendix I). *Cf. Torcaso v. Watkins,* 367 U.S. 488 (1961).

In North Carolina, persons "who shall deny the being of Almighty God" were disqualified from holding public office.[37] Tennessee denied office holding to "any person who denies that the being of God, or a future state of rewards and punishments," and also denied a seat in the legislature to any "Minister of the Gospel."[38]

The total dearth of any such discussion powerfully undermines the erroneous proposition that the Fourteenth Amendment was intended to apply, or impliedly applied, the Establishment Clause to the states. Absent a specific intent to amend the Constitution and to apply the Establishment Clause to the states in clear language, the Tenth Amendment reserves that power to the states.

### *F. State Supreme Court Decisions Rendered Immediately after Passage of the Fourteenth Amendment Demonstrate that the First Eight Amendments and Especially the Establishment Clause Were Not Made Applicable to the States.*

The Supreme Court of New Hampshire, five months after ratification of the Fourteenth Amendment by the states in July of 1868, explicitly concluded that the matter of an establishment of religion is still "left exclusively to the state government." *Hale v. Everett*, 53 N.H. 9 (1868). In the entire 276-page opinion and dissent the court found no reference to the Fourteenth Amendment necessary. As the district court below noted, the only reference in the opinion of the United States Constitution contained the following quote from Justice Story's COMMENTARIES regarding the First Amendment:

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[37]N.C. CONST. art. VI, § 5 (1868).

[38]TENN. CONST. art. IX, §§ 2 & 1 (1843). *Cf. McDaniel v. Paty*, 435 U.S. 618 (1978). *See also Church of the Holy Trinity v. United States*, 143 U.S. 457, 468-70 (1892). Justice Frankfurter pointed out in *Bartkus v. Ill.*, 359 U.S. 121, 125 (1959), that the Constitutions of fifteen states ratifying the Fourteenth Amendment did not comply with "the *grand jury guarantee* of the Fifth Amendment, the *criminal jury guarantee* of the Sixth Amendment, and the *civil jury guarantee* of the Seventh Amendment" (emphasis added):

> [I]f the first eight amendments were being applied verbatim to the States, ten of the thirty ratifying States would have impliedly been imposing upon themselves constitutional requirements on vital issues of state policies contrary to those present in their own constitutions.

*Bartkus v. Ill.*, 359 U.S. at 125.

> [T]he whole power over the subject of religion is *left exclusively to the State governments*, to be acted upon according to their own sense of justice and the State constitutions. . . .
>
> Probably at the time of the adoption of the constitution and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that *Christianity ought to receive encouragement from the state*, so far as not incompatible with the private rights of conscience and the freedom of religious worship.[39]

Similarly, the Wisconsin Supreme Court rejected the argument that a state statute which permitted "a party to be put on trial for a felony merely upon an information, is in *violation of the Fourteenth Amendment to the Constitution of the United States.*" The unanimous court held:

> [T]he words "due process of law," in this [fourteenth] amendment, *do not mean and have not the effect to limit the power of the state governments* to prosecute for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed form and in accordance with the general rule for the protection of individual rights . . . [I]f the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by informative [sic] *there is nothing in the 14th amendment to the constitution of the United States, which prevents them from doing so.*

*Rowan v. State*, 30 Wis. 129, 148 (1872) (emphasis added).[40]

### *G. The Blaine Amendment and Subsequent Congressional Debates Demonstrate that Representatives and Senators*

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[39] *Hale v. Everett*, 53 N.H. at 124, quoting from 2 STORY'S COMMENTARIES §§ 1879 & 1874 (4th ed. 1873) (emphasis added) (used by the district court in *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1123-24). The opinion discussed whether the state court could restrain the wardens of the First Unitarian Society of Christians from permitting a heretical preacher from occupying the pulpit.

[40] *See also Weimer v. Bunbury*, 30 Mich. 201, 208 (1874); *Romero v. State*, 60 Conn. 92, 94 (1891); *State v. Hayes*, 127 Conn. 543, 581, 18 A.2d 895, 914 (1941); and *State v. Roberts*, 166 Ind. 585, 591, 77 N.E. 1093, 1094 (1906).

***who Participated in the Debates on the Fourteenth Amendment Just Seven Years Earlier Did Not Believe that the Establishment Clause Thereby Applied to the States.***

In 1875, Sen. Blaine of Maine introduced a constitutional amendment to prohibit states from establishing a religion. However, *not a single senator or representative objected* to the amendment on the grounds that the Fourteenth Amendment made such unnecessary, even though 23 members of Congress had been in the House or Senate when the Fourteenth Amendment was passed just seven years earlier, as noted by the district court below. *Jaffree v. Board of School Commissioners,* 554 F. Supp. at 1125-26. The district court below relied on a study of the debates on the amendment by F. William O'Brien entitled JUSTICE REED AND THE FIRST AMENDMENT:

> Congressman Banks, a member of the Thirty-ninth Congress, observed: "If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment, it prohibits the States from exercising a power they now exercise." Senator Frelinghuysen of New Jersey urged the passage of the "House article," which "prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise." Senator Stevenson, in opposing the proposed amendment, referred to *Thomas Jefferson "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion* . . . [N]one of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.[41]

For these reasons, Appellant-Intervenors urge this Court to reject

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[41] F. O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 116-17 (n.d.) (emphasis supplied by the district court). *See* 4 CONG. REC. 5191, 5561 (1876). *Accord,* Meyer, *The Blaine Amendment and the Bill of Rights,* 64 HARV. L. REV. 939, 945 (1951) (included in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals as Appendix VII).

36 years of erroneous historical interpretation and return to the view held by this Court for three-quarters of our Constitutional history: that the Fourteenth Amendment does not apply the Establishment Clause to the states in view of its language, intent and history.

## III.

**Even if this Court Finds that It Has Jurisdiction Over Religious Establishment Practices in the States, Its Prior Interpretations Conflict With the Language, Intent, and History of the Establishment Clause. The Establishment Clause Did Not Prohibit Prayer and Bible Reading in Schools Under Federal Control.**

### *A. The Framers of the Establishment Clause Intended that It Be Applied to Prohibit Only the Federal Government's Establishment of a National Church or Sect, Not to Prevent All Nondiscriminatory Support of Religion.*

Relying on the exhaustive historical research of Professor Robert L. Cord in SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982)[42] and the testimony of Appellant's expert Professor James McClellan, the district court below found:

> The first amendment "in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791 . . . The drafters of the first amendment understood the first amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the first amendment.[43]

After a comprehensive examination of the debates and actions of Congress and the states, in a 302-page study which relies on hundreds of quotations from original source material, Professor Cord concludes that Congress intended that the "establishment of religion" was limited to the establishment of a national church and did not prohibit federal aid for the support of religions in general: "The facts simply do not accord with the hard separationist position;

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[42] *See supra* note 18.

[43] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1115.

but they are perfectly consistent with a moderate separationism, under which the state may choose to use sectarian means to accomplish secular ends as long as it refrains from the assumption of ecclesiastical authority or sectarian partisanship."[44] He cites four specific reasons for rejecting the view that establishment of religion meant "aid[ing] all religions," as held by Justice Black in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947):

> First, the resolutions of the State Constitutional Ratifying Conventions from Maryland, Virginia, New York, North Carolina, and Rhode Island, understood in their historical context, all urged a constitutional amendment prohibiting *a single national religious establishment.*
>
> Second, in response to these State Ratifying Convention's requests, James Madison introduced his original draft of the Establishment Clause which on its face is clearly designed to foreclose a national religion, *not religions.*
>
> Third, Madison's interpretation given to Roger Sherman during the House's August 15, 1789 debate as to what the House's Select Committee's Report meant (regarding its recommended prohibition "that no religion shall be established by law") indicates clearly that Madison believed Congress was being denied the power to "establish a national religion" *not religions.*
>
> Fourth, the final wording of the religious clauses of the First Amendment — "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" — shows the intent to prevent a single and not some pluralistic national religious establishment.[45]

***B. The Contemporaneous Passage by Early Congresses and the State Legislatures of Acts Benefiting All Religion in Public Education Indicate that Religious Activities, such as Prayer and Bible Reading in Schools, Were Never Viewed as an Establishment of Religion.***

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[44]R. CORD, *supra* note 18, at xi, 11-12.

[45]*Id.* at 11 (emphasis in original, footnotes omitted).

The First Congress reenacted the Northwest Ordinance just eight days prior to a major debate on the Establishment Clause and 58 days prior to Congressional ratification of the First Amendment. It provided for government of the Northwest Territories and distribution of federal land with this requirement: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[46]

As Professor McClellan asked: "[i]f setting up a school to encourage prayer is a violation of religious establishment, why did [the First Congress] adopt such a law?" (T. 548)

The view of Professors Cord and McClellan explains why Congress, the day after adopting the Establishment Clause, did not believe it was violating that clause when it passed a resolution calling on President Washington to set aside a day for observance of thanksgiving, fasting, and prayer. R. CORD, *supra* note 18 at 27-29. James Madison as a member of the House voted for this resolution and later as president issued four prayer proclamations himself. In light of the widespread practice of prayer and Bible reading in schools, children apparently participated in these days of prayer.[47]

Cord's view of the Establishment Clause explains why Congress could appoint a chaplain three days prior to its adoption of the First Amendment without believing that it was establishing a religion. Such federal aid of all religions is "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, ___ U.S. at ___, 103 S. Ct. at 3336.[48]

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[46]Northwest Ordinance, art. III, 1 Stat. 52 (Aug. 7, 1789), quoted by Dr. McClellan at T.548. The Act creating the Mississippi and Alabama Territory provided that the people of the territory "shall be entitled to and enjoy all and singular rights, privileges and advantages granted to the people of the Territory of the United States northwest of the River Ohio." 1 Stat. 549 (Apr. 7, 1798).

[47]*See* W. SMALL, EARLY NEW ENGLAND SCHOOLS 300-04 (1969) and W. BURTON, THE DISTRICT SCHOOL AS IT WAS 55 (1928).

[48]Another Congressional resolution specified that "divine services" should be held in St. Paul's Chapel in the District of Columbia as a part of George Washington's inauguration in 1789 to be "performed by the Chaplain of Congress" following administration of the oath of office. P. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 87 (rev. ed. 1964).

President Jefferson, the author (in 1802) of the "separation of church and state" dictum, submitted a treaty to the Senate in 1803 that provided federal money "to be used to support a Catholic priest and to be used to build a church for the ministry of the Kaskaskia Indians." *Jaffree v. Board of School Commissioners,* 554 F. Supp at 1117. Professor Cord cites page after page of early Congressional enactments which provided federal land or funds "for the propagation of the Gospel" among the Indians through schools.[49]

Relying on the research of Professors Cord and McClellan, the district court held that Jefferson's "wall of separation" is to be correctly interpreted as erecting a wall "in regard to possible federal action such as a law establishing a national religion or prohibiting the free exercise of worship." *Jaffree v. Board of School Commissioners,* 554 F. Supp. at 1118. It did not limit the activities of churches and individuals in order to protect the state or federal governments.

In view of the language, intent, and history of the Establishment Clause and contemporaneous acts of the First Congress and subsequent Congresses, Appellant-Intervenors petition this Court to find that prayer and other religious activities, encouraged in schools supported by federal aid during the early Congressional period, are constitutional.

## IV.

## The Supremacy Clause and Stare Decisis Rules Require this Court to Overrule its Recent Prayer Decisions and to Sustain the Challenged Prayer Statutes and Activities.

### *A. The Supremacy Clause of the Constitution Mandates that the Supreme Court Give More Attention to the Constitu-*

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[49]R. CORD, *supra* note 18, at 42-45, 62-79, and 261-70. State land was granted by statute for the support of religious schools in many of the states. II STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS AT THE END OF THE CENTURY: A HISTORY 260-326 (1902); VIII CONN. STATE RECORDS 100 (1795); LAWS OF THE STATE OF N.Y. PASSED AT THE 18TH SESS. OF LEGISLATURE ch. 75, 50-51, (Apr. 9, 1795); PA. STAT. AT LARGE (1791-1793) 71-73 ch. MDLVII; and 5 S.C. Stat. 357 (Dec. 21, 1799). *See also* C. ANTIEAU, A. DOWNEY, & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT — FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 173-74 (1964).

***tion Itself than to the Court's Prior Interpretations of It.***

The Supremacy Clause of the Constitution states that "this Constitution [is] . . . the supreme law of the land . . . " U.S. CONST. art. VI, cl. 2. Justice Frankfurter, concurring in *Graves v. New York, ex rel. O'Keefe,* 306 U.S. 466, 491-92 (1939), stated this principle well: "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."[50]

This Court in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) relied on "recent historical research by a competent scholar" in overruling almost 100 years of judicial assumption of power. *Id.* at 73. Where the Supreme Court has believed that it was in error, it has not hesitated to overrule itself: 27 times prior to 1938, 21 times in the next twelve years, and 12 times in the next decade.[51] Between 1960 and 1979 the Court overruled itself in no less than 47 constitutional cases.[52] Where recent but erroneous precedents are upheld by the courts in violation of the clear meaning of the Constitution, then the action of the courts is "as Mr. Justice Holmes said, 'an unconstitutional assumption of power by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' " *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 532-33 (1928), quoted in *Erie,* 304 U.S. at 79 (per Brandeis, J.).

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[50]A New York court seized on this principle in *Wuebker v. James,* 58 N.Y.S.2d 671, 677 (Schenectady Co. Ct. 1944): "Article 6 of the Federal Constitution . . . does not require an oath to support . . . any court decision."

[51]*See, e.g.,* footnoted cases in *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 407 n.2, 409 n.4 (1932) (Brandeis, J., dissenting, citing cases). Amicus Curiae Concerned Women for America Education & Legal Defense Foundation submitted a brief to the Eleventh Circuit Court of Appeals on the subject of stare decisis (included in its entirety in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals as Appendix VIII).

[52]Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law,* 1980 WIS. L. REV. 467, 494-96. Justice Douglas noted that stare decisis has a limited place in deciding constitutional issues:

> A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that *it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it* . . .

Douglas, *Stare Decisis,* 49 COL. L. REV. 735, 736 (1949) (emphasis added).

### *B. The Supreme Court Has Consistently Looked to the Language, the Intent of the Adopting Congress and Ratifying State Legislatures, and the History of a Constitutional Amendment in Interpreting the Terms of a Constitutional Provision.*

As the trial court noted, quoting *Hawaii v. Mankichi*, 190 U.S. 197, 212 (1903): "[t]he intention of the lawmaker is the law."[53] Chief Justice Burger in *Marsh v. Chambers*, held that "[h]istorical evidence sheds light not only on what the draftsmen *intended* the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress —their actions reveal their intent." *Marsh*, ___ U.S. at ___, 103 S. Ct. at 3344 (emphasis added). *Accord Wisconsin v. Pelican Insurance Co.*, 127 U.S. 265, 297 (1888).[54]

The Northwest Ordinance and other congressional acts relating to religious education, which were enacted by the First and other early Congresses close to the adoption of the First Amendment, provide a unique history which the Supreme Court must examine if it is to discover Congress' meaning in the Establishment Clause.

### *C. The Precedents of This Court for 156 Years Uniformly Held that Neither the First Nor the Fourteenth Amendment Prevents State Religious Establishments nor Applies All of the First Eight Amendments to the States. These Cases Should Be Followed in Upholding the Challenged Prayer Statutes and Activities.*

Although this Court has held that its considered practice is "not to apply stare decisis as rigidly in constitutional as in non-constitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), it is bound to examine what it previously held for almost three-fourths of our

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[53] *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1120. *See also Atkins v. Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 301 (1873); *Jones v. N.Y. Guaranty & Indemnity Co.*, 101 U.S. 622 (1879); and *Whitney v. Wyman*, 101 U.S. 392 (1879).

[54] *See also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922); *Frank v. Md.*, 359 U.S. 360, 370 (1959), *reh'g denied* 360 U.S. 914 (1959); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936); *Meyers v. United States*, 272 U.S. 52, 175 (1926); and *Walz v. Tax Comm'n*, 397 U.S. 664, 686 (1970) (Brennan, J., concurring).

constitutional history.

This Court on numerous occasions refused to apply the first eight amendments to the states through the Fourteenth Amendment.[55] In *Adamson v. California*, 332 U.S. 46 (1947), Mr. Justice Frankfurter, concurring, summarized the state of incorporation:

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court — a period of *seventy years* — the scope of that Amendment was passed upon by *forty-three judges*. Of all of these judges, *only one, who may respectfully be called an eccentric exception, ever indicated the belief . . . that due process incorporated those eight Amendments as restrictions upon the power of the States* . . . [T]hey were also judges mindful of the relation of our federal system to a progressively democratic society and therefore *duly regardful of the scope of authority that was left to the States even after the Civil War*.[56]

### *D. The Present Supreme Court Must Overrule Its Prior Decisions and the Appellate Court Below Where Those Decisions Conflict with the True Intent of the Drafters of the Constitution.*

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[55] *See Twitchell v. Pa.*, 74 U.S. (7 Wall.) 321 (1869); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Hurtado v. Cal.*, 110 U.S. 516 (1884); *In re Kemmler*, 136 U.S. 436 (1890); *Maxwell v. Dow*, 176 U.S. 581 (1900); *Twining v. N.J.*, 211 U.S. 78 (1908); *Palko v. Conn.*, 302 U.S. 319 (1937); *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530 (1922); and *Adamson v. Cal.*, 332 U.S. 46 (1947). *See also* Justice Harlan, concurring in *Griswold v. Conn.*, 381 U.S. 479, 500 (1965); *Gideon v. Wainwright*, 372 U.S. 335, 352 (1963); and *Lanza v. N.Y.*, 370 U.S. 139, 147 (1962); Justice Rehnquist, dissenting, in *Carter v. Ky.*, 450 U.S. 288, 309 (1981) and *Thomas v. Review Bd.*, 450 U.S. 707, 721 (1981); Justice Harlan, dissenting in *Poe v. Ullman*, 367 U.S. 497, 540 (1961) and *Roth v. United States*, 354 U.S. 476, 503 (1957); and Justice Jackson, dissenting in *Beauharnais v. Ill.*, 343 U.S. 250, 288 (1952). *See also Baron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and *Permoli v. New Orleans*, 44 U.S. (3 How.) 589, 609-10 (1845), for the Court's view prior to adoption of the Fourteenth Amendment.

[56] *Adamson v. Cal.*, 332 U.S. at 62 (emphasis added). Mr. Justice Frankfurter relied upon Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* *supra* note 23, as a persuasive legal scholar.

The court of appeals below held that the Supreme Court has "carefully considered these arguments [as to application of the Fourteenth Amendment to the states and a broad definition of the Establishment Clause] and rejected them." *Jaffree v. Wallace*, 705 F.2d at 1530. However, in *Abington School District v. Schempp*, 374 U.S. 203, 217 (1963), the first case relied on by the appellate court, this Court acknowledges that "none of the parties . . . [had] questioned these basic conclusions of the Court . . . ," and the Court did not request briefs on the subject. The real history of the Establishment Clause did not have a day in court.

In *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962), the Court failed to supply "any citation to authority" to support its proposition that the Establishment Clause applied to the states. *Jaffree v. Board of School Commissioners*, 554 F. Supp. at 1110.

Considerable evidence was presented to the trial court in this case which was not available to the Supreme Court when it passed upon the meaning of the Establishment Clause and its applicability to the states in *Everson*, *Engel*, and *Abington*:

(1) Extensive evidence on the erroneous application of the Establishment Clause (and the Bill of Rights) to the states through the Fourteenth Amendment.[57]

(2) An extensive study of the financial involvement of the federal government in sectarian educational projects in the early Constitutional period — projects which were approved by both Jefferson and Madison;[58] and

(3) Testimony showing how rivalry between the former colonies and fear of a national religious establishment caused the First Congress to prohibit the federal government from promoting a single religious sect or denomination.[59]

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[57] *See* R. BERGER, *supra* note 22, cited with approval by the court below, *Jaffree v. Bd. of School Comm'rs*, 554 F. Supp. at 1122; and H. MEYER, *supra* note 23.

[58] R. CORD, *supra* note 18 (Defendant-Intervenor Ex. 14, excerpted in Brief of the Appellee-Intervenors to the Eleventh Circuit Court of Appeals at Appendix II).

[59] T. 530-32. The expert testimony of Professor James McClellan was expanded on by his article, *The Making and the Unmaking of the Establishment Clause*, *supra* note 36.

## Conclusion

*Engel, Abington, Everson* and the cases that followed them have had a chilling effect on free speech and free exercise of religion by teachers and students in public schools since 1961. Can teachers express their views on religion or instruct their students in the religious values of our culture without violating the Establishment Clause?[60] Is the school board or teacher prohibited from including segments in the curriculum which are religious in nature, or must only non-theistic, secular values be taught?[61]

Will teachers or students who have a faith in God be in contempt of court if they pray silently or verbally in plain view of their classes? If so, one teacher testifed at trial that she will be forced to choose between receiving the benefit of her employment and her religious convictions.[62]

Are teachers now prohibited from discussing the meaning of Christmas, Thanksgiving, Easter, and other religious holidays? Are they barred from singing religious songs, an activity which the district court has now suppressed in part because of the complaint of Jaffree?

Questions as these are stifling academic freedom in American public schools until teachers cannot instruct in anything but secular or nontheistic values of our culture. Prior Court's interpretations of the Establishment Clause have created a hostility toward religion in public education that was expressly forbidden by the Court in *Abington,* 374 U.S. at 225. *See supra* notes 17 and 45.

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[60]Defendant-Intervenors' expert witnesses testified that education cannot be free of religion and that all values are religious. *See* testimony of Dr. D. James Kennedy (T. 635), Dr. R. J. Rushdoony (T. 322), and Dr. Norman Harper (T. 731).

[61]*See Stone v. Graham,* 449 U.S. 39, 40 (1980).

[62]*See* testimony of Karen Phillips. (T. 664) *Cf. Thomas v. Review Bd.,* 450 U.S. 707 (1981).

The 624 teachers, parents, and students who are Defendant-Intervenors petition this honorable Court to examine the historical evidence presented for the first time to the trial court below by the adversarial system and stop the present oppression of their rights of free speech and free exercise of religion by returning to the original intent of the Establishment Clause.

Respecfully submitted,

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# APPENDICES

## Constitutional and Statutory Provisions

United States Constitution:

Article VI, Section 2:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

Northwest Ordinance, 1 Stat. 50, 52, art. III (Aug. 7, 1789):

> "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

ALA. CODE § 16-1-20.1 (1981):

> "At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

ALA. CODE § 16-1-20.2 (1982):

> "From henceforth, any teacher or professor in any public educational institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, *may lead willing students in prayer,* or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, *in the sanctity of our homes* and in the classrooms of our schools *in the name of our Lord.* Amen."

# UNITED STATES COURT OF APPEALS
# FOR THE ELEVENTH CIRCUIT

## CONSOLIDATED CASES:

Civil Action No. 83-7046 and Civil Action No. 83-7047

ISHMAEL JAFFREE, et al.,

*Plaintiffs-Appellants*

v.

GEORGE C. WALLACE, et al.,

*Defendants-Appellees*

DOUGLAS T. SMITH, et al.,

*Intervenors-Appellees*

* * * * * * * * * * * * * *

ISHMAEL JAFFREE, et al.,

*Plaintiffs-Appellants*

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

*Defendants-Appellees*

DOUGLAS T. SMITH, et al.,

*Intervenors-Appellees*

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Douglas T. Smith, et al., intervenors, appellees in the Court of Appeals above-named, hereby appeal to the Supreme Court of the United States from the judgment of the Court of Appeals reversing the District Court's dismissal of the complaints, originally entered in this section on May 12, 1983, with a Petition for Rehearing and Suggestion for Rehearing En Banc denied August 15, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1254 (2).

/s/ Thomas O. Kotouc
Counsel for Douglas T. Smith
et al., Intervenors
Appellants in the Supreme Court

## CERTIFICATE OF SERVICE

I hereby certify that I have, this date, served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States by first class U.S. Mail, upon counsel for all parties of record, known to the undersigned.

Done this 2nd day of November, 1983.

/s/ Thomas O. Kotouc
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